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No. 04-1021

In The

Supreme Court of the United States

MICHIGAN HIGH SCHOOL ATHLETIC ASSOCIATION, INC.,

Petitioner,

vs.

COMMUNITIES FOR EQUITY, ET AL.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF AND BRIEF OF *AMICUS CURIAE* NATIONAL FEDERATION OF STATE HIGH SCHOOL ASSOCIATIONS IN SUPPORT OF PETITIONER

WILLIAM E. QUIRK
Counsel of Record
JAMES M. HUMPHREY
SHUGHART, THOMSON & KILROY, P.C.
Twelve Wyandotte Plaza
120 West 12th Street
Kansas City, Missouri 64105
(816) 421-3355

Attorneys for Amicus Curiae

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MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF IN SUPPORT OF PETITIONER

Although Petitioner Michigan High School Athletic Association, Inc. ("MHSAA") has consented to the filing of this *amicus curiae* brief by the National Federation of State High School Associations ("NFHS"), Respondent Communities for Equity ("CFE") has withheld consent. The NFHS therefore moves, pursuant to Supreme Court Rule 37.2(b), for leave to file this *amicus curiae* brief in support of Petitioner.

The NFHS is the national service and administrative organization of high-school athletics. The NFHS provides leadership and national coordination for the administration of athletic programs and other interscholastic activities. Petitioner MHSAA, along with high-school athletic or activities associations in each of the other 49 states and the District of Columbia, is a member of the NFHS.

This case involves the implementation of separate-gender-high-school athletic programs, which directly implicates the NFHS's administrative and leadership role over high-school athletics. The NFHS therefore has a substantial interest in this case. The NFHS is also interested in the outcome of this case because it involves and affects a member institution. As the national leader and coordinator of high-school athletics, the NFHS's position on the impact of the Sixth Circuit's decision should be considered by the Court.

In addition, CFE's only stated basis for withholding consent is that *amicus curiae* briefs are not allowed at the petition-for-certiorari stage. The plain terms of Supreme Court Rule 37, however, endorse the filing of an *amicus curiae* brief in support of a petition for a writ of certiorari.

See Sup. Ct. R. 37.2 ("An *amicus curiae* brief submitted before the Court's consideration of a petition for a writ of certiorari, . . . may be filed . . . ").

Because CFE has not offered a legitimate basis to oppose the filing of the NFHS's *amicus* brief – and based on the NFHS's identified interests in this case – the NFHS respectfully requests leave to file the attached *amicus curiae* brief in support of Petitioner.

Respectfully submitted,

WILLIAM E. QUIRK
Counsel of Record
JAMES M. HUMPHREY
SHUGHART, THOMSON & KILROY, P.C.
Twelve Wyandotte Plaza
120 West 12th Street
Kansas City, Missouri 64105
(816) 421-3355

Attorneys for Amicus Curiae

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BRIEF OF NATIONAL FEDERATION OF STATE HIGH SCHOOL ASSOCIATIONS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

This *amicus curiae* brief is submitted by the National Federation of State High School Associations ("NFHS").[1] Petitioner Michigan High School Athletic Association, Inc. ("MHSAA") has consented to the NFHS's filing of this brief. Respondent Communities for Equity has withheld consent. A motion for leave to file this *amicus* brief under Supreme Court Rule 37.2(b) is therefore included with this brief.

INTEREST OF *AMICUS CURIAE*

The NFHS is the national service and administrative organization of high-school athletics. Founded in 1920, the NFHS is composed of one high-school athletic or activities association in each of the fifty states and the District of Columbia. The NFHS's membership, in turn, provides membership for approximately 90 percent of the high schools in the United States.

The NFHS's mission is to provide leadership and national coordination for the administration of interscholastic

[1] Pursuant to Supreme Court Rule 37, the NFHS states that this brief has not been authored in whole or in part by counsel for a party to this case. The brief was instead authored by outside counsel for the NFHS. The NFHS further states that no person or entity other than the NFHS made a monetary contribution to the preparation or submission of this brief. Although Petitioner MHSAA is a member of the NFHS, and has paid the standard annual membership dues, it has not made any specific financial contribution to this brief's preparation or submission.

activities. The NFHS works to enhance the educational experiences of high-school students and to reduce the risks to them of participating in interscholastic athletic programs. The NFHS strives to promote participation and sportsmanship, to develop good citizens through activities that provide equitable opportunities, and to maximize the achievement of educational goals. The NFHS wants to protect interscholastic athletics.

The NFHS's mission and objectives give it a significant interest in successfully implementing separate-gender athletic programs in American high schools. Separate programs are essential to meaningful and rewarding participation for both genders. But the Sixth Circuit's decision in this case threatens the very existence of separate programs by making even routine decisions to implement such programs presumptively unconstitutional. The NFHS believes the Sixth Circuit's decision will harm high-school interscholastic athletics and believes that certiorari should be granted both to correct the Sixth Circuit's erroneous equal-protection analysis and to ensure equality in high-school athletics.

SUMMARY OF ARGUMENT

The Sixth Circuit's application of heightened scrutiny to the scheduling decisions at issue might ostensibly appear to promote gender-equity in high-school athletics. The NFHS believes, however, that the decision will have the opposite effect. Implementing decisions that are not facially discriminatory, like the ones at issue here, should not be presumptively unconstitutional. Decisions to allocate scarce resources between genders are difficult

enough already. The goals of separate-gender athletics would be better served by requiring challenges to already-difficult allocation decisions to show discriminatory intent or overall inequality to establish a constitutional violation.

ARGUMENT

The NFHS fully embraces Title IX and all that it entails. Even beyond Title IX, however, the NFHS seeks to promote, to the fullest extent possible, equality in athletics at the high-school level. The NFHS also wants to make high-school-sports participation for both girls and boys as broadly available as possible. The NFHS has substantial fears, however, that the Sixth Circuit's decision in this case threatens these efforts.

Notably, this case does not involve a challenge to the threshold decision to have separate boys and girls athletic teams at the high-school level. This is undoubtedly because Respondents (and society in general) recognize the benefits of such a system. The attack is instead directed at specific decision-making necessary to implement separate-gender athletic programs. But the Sixth Circuit's decision to make all such implementing decisions subject to heightened scrutiny may well lead to unintended consequences.

High-school administrators around the nation have limited resources to allocate fairly between girls and boys programs. The need for separate programs also requires a host of day-to-day, practical, decisions. The Sixth Circuit's application of the heightened scrutiny established in *United States v. Virginia*, 518 U.S. 515 (1996), automatically, and unfairly, subjects such everyday decisions to a presumption of intentional discrimination. This presumption will

encourage challenges to, and unwarranted second-guessing of, every routine implementing decision. Administrators and officials will be saddled with the knowledge that every decision they make will require an "exceedingly persuasive justification[,]" *United States v. Virginia*, 518 U.S. at 531, and mere "reasonable" decision-making will not be acceptable.

From a practical standpoint, implementing decisions should not be viewed with such a skeptical eye. In the experience of the NFHS, the vast majority of high-school administrators make their decisions with the proper allocation of resources and gender-equality in mind. But because virtually any decision can be said to favor either boys or girls, a presumption of discrimination will only make it more difficult to allocate scarce resources fairly.

The NFHS believes that facially-neutral implementing decisions, like the scheduling decisions at issue here, should not require an "exceedingly persuasive justification." The high-school-athletic system would instead be better served by requiring a challenger to at least make a threshold showing that an implementing decision was either motivated by discriminatory intent or would lead to overall inequality. If the Sixth Circuit's decision is allowed to stand, unwarranted challenges may overwhelm an already burdened system and threaten the viability of separate-gender sports.

CONCLUSION

For the reasons set forth by Petitioner MHSAA, and the additional reasons identified above, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

WILLIAM E. QUIRK
Counsel of Record
JAMES M. HUMPHREY
SHUGHART, THOMSON & KILROY, P.C.
Twelve Wyandotte Plaza
120 West 12th Street
Kansas City, Missouri 64105
(816) 421-3355

Attorneys for Amicus Curiae

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